

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTMARK DEVELOPMENT CORPORATION,
a Washington corporation, and TRIZEC
INVESTMENT CORPORATION, a Washington
corporation,

Plaintiffs,

v.

CITY OF BURIEN, a municipal corporation,

Defendant.

No. C08-1727 RSM

**PLAINTIFFS' MOTION FOR
ATTORNEYS FEES**

**Note on Motion calendar:
Monday, November 18, 2013**

[Oral Argument Requested]

I. INTRODUCTION

This litigation has been proceeding since 1996. The only remaining issue is the
Plaintiffs' claim for attorney's fees pursuant to 42 U.S.C. § 1988.

Plaintiffs Westmark Development Corporation and Trizec Investment Corporation
(hereinafter "Westmark" or "Plaintiffs") file this motion for attorneys fees pursuant to the
schedule set forth in the Court order.

1 The United States Court of Appeals for the Ninth Circuit has resolved most of the
2 issues concerning Burien's liability for attorneys fees. In its Memorandum decision, the
3 Ninth Circuit held that after the favorable state court determination,

4 At that point, Westmark was eligible to recover attorney's fees on its §
5 1983 claim, provided two conditions were met: (1) its federal
6 constitutional claim is "substantial" under *Hagans v. Lavine*, 415 U.S.
7 528, 537-38 (1974); and (2) its state law claims and its federal
8 constitutional claim arise out of a "common nucleus of operative fact"
under *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725
(1966). See *Gerling Global*, 400 F.3d at 808.

Both of these requirements are met here.

9 Memorandum decision at 2-3, January 7, 2013 (copy provided for convenience as Appendix
10 A).

11 The Ninth Circuit further ruled:

12 The second condition is met because Westmark's state law claims
13 arise out of the same common nucleus of operative fact as its federal
14 substantive due process claim (namely, Burien's improper conduct
15 during the permitting process for Westmark's development project),
and Westmark originally attempted to litigate those claims in the same
judicial proceeding.

16 *Id.* at 3.

17 The Ninth Circuit recognized that the "special circumstances" exception remains to be
18 addressed. That will be discussed below. It will be shown there are no special circumstances
19 that warrant denial of fees.

20 The Ninth Circuit also cautioned that fees are available only for work that involved
21 similar facts, legal theories, and relief sought. *Id.* at 4. As the Court will see, Westmark has
22 taken the most conservative approach and is only seeking fees related to the substantive due
23 process claim itself, and the most closely related state law claim which is the intentional

1 interference with business expectancy claim. That claim involves the same facts, and is based
2 on the same improper conduct, and same damages as the substantive due process claim.
3 Likewise, the legal elements required for the intentional interference claim include showing
4 improper conduct and improper purposes, just as the substantive due process claim also
5 focuses on the arbitrary conduct where Burien tried to kill the project, not for legitimate
6 regulatory purposes, but for improper purposes of trying to appease a local politician and to
7 keep “apartment people” out of the city.

8 **II. PROCEDURAL BACKGROUND**

9 Westmark has consistently alleged that Burien violated Westmark’s substantive due
10 process rights by arbitrarily and capriciously using its governmental power to delay and
11 attempt to completely block a multi-family development project. *See* Amsbary Decl. in
12 Supp’t of Plfs’ Second Mot. for Part. Summ. J. (Dkt. #57), Ex. A (Second Am. Compl.), ¶¶
13 3.1-3.4, 3.8-3.11, 3.20-3.21, 4.1-4.23, and 8.4; Ex. B (Am. Compl.), ¶¶ 7, 17-20, 22-26.
14 Burien’s purpose for singling out and attempting to thwart Westmark’s project was not for
15 legitimate regulatory purposes, but was for political purposes – including appeasing a state
16 legislator who lived adjacent to the project site. Amsbary Decl., Ex. B, ¶ 20. These
17 allegations were also the basis for the state law tort claim that Burien improperly interfered
18 with Westmark’s business expectancy.

19 Trial on all claims was originally scheduled to begin in March 1998 in Snohomish
20 County Superior Court. However, shortly before trial, the parties reached a settlement.
21 Pending motions for summary judgment were cancelled and the trial date was stricken. *See*
22 Amsbary Decl., Ex’s C, D, and E (letters between counsel and notice to strike trial date).

1 Unfortunately, the settlement fell apart. Westmark filed a second lawsuit (“*Westmark*
2 *II*”) seeking to enforce the settlement. The Washington Court of Appeals in *Westmark II* held
3 that an enforceable settlement agreement had been reached between Westmark and Burien.
4 *City of Burien v. Westmark Dev. Corp.*, Wash. Ct. App. No. 45562-1-I, noted at 103 Wn. App.
5 1037 (2000). The appellate court remanded *Westmark II* back to the trial court to determine if
6 Burien breached the agreement. *Id.*

7 As *Westmark II* proceeded toward trial on the breach issue, Burien disclosed that the
8 1998 settlement had been approved by the City Council in executive session, rather than an
9 open public meeting. This meant the settlement violated Washington’s Open Public Meetings
10 Act, chapter 42.30 RCW, and was void as a matter of law. Because of this deficiency, the
11 trial court was compelled to declare the original settlement void. *See* Amsbary Decl., Ex. A
12 ¶¶ 5.8-5.11; Ex. B, ¶ 9 (Dkt. #57); *see also* Burien’s Answer & Affirm. Defs., ¶ 9 (Dkt. #53).

13 Having voided the settlement, the state trial court exercised its equitable power and
14 allowed Westmark to reopen its original case filed in 1996. *See* Amsbary Decl., Ex. A, ¶ 5.11
15 (Dkt. #57). Accordingly, Westmark filed its amended complaint and retained its original
16 causes of action against Burien, including its substantive due process claim. However,
17 Westmark added individual defendants who previously were not included in the original
18 lawsuit.

19 One of the new defendants removed the case to federal court based on federal question
20 jurisdiction over the § 1983 claim. *See* Notice of Removal, W.D. Wash. No. C04-2243 (Dkt.
21 #1). On December 8, 2004, the District Court, acting *sua sponte*, remanded the state law
22 claims back to state court, but retained jurisdiction over the § 1983 claim. *See* Order
23 Declining Supplemental Jurisdiction, Remanding State Claims, and Staying § 1983 Federal

1 Claim, W.D. Wash. No. C04-2243 (Dkt. #30). The District Court then stayed the § 1983
2 claims pending resolution of the state law claims in state court. *Id.*

3 The case proceeded in state court and resulted in a jury verdict in favor of Westmark
4 for \$10,710,000. The Court of Appeals affirmed. *See Westmark Dev. Corp. v. City of Burien*,
5 140 Wn. App. 540 (2007). The Washington Supreme Court denied review. *Westmark Dev.*
6 *Corp. v. City of Burien*, noted at 163 Wn.2d 1055 (2008). The mandate issued on September
7 12, 2008, and a satisfaction of judgment was filed on September 19, 2008, thus bringing the
8 state court proceedings to a close.

9 Pursuant to a tolling agreement, Westmark then re-opened its substantive due process
10 litigation against Burien. *See Amsbary Decl., Ex. B (Dkt. #57)*. In re-opening this phase of
11 the litigation, Westmark has been express in explaining that it is not seeking additional
12 damages or any other relief. Rather, Westmark is seeking only its attorney's fees under 42
13 U.S.C. § 1988. *Id.*, Ex. B., ¶ 3.

14 III. ARGUMENT

15 A. The Intentional Interference Claim Is Closely Related 16 to the Substantive Due Process Claim

17 As mentioned above, Westmark is only seeking the fees that furthered the litigation
18 with respect to the intentional interference claim. While other state law claims may be argued
19 to also be sufficiently related, Westmark is taking the most conservative approach and
20 focusing only on the intentional interference claim. That claim, along with the substantive
21 due process claim, was always the primary legal theory being pursued by Westmark and was
22 the focus of the trial that was eventually held in 2005. The intentional interference claim is
23 properly the subject of the fee award.

1 As the Court will see, significant effort has been taken to segregate the time and
2 conservatively include only time related to the substantive due process claim and the
3 intentional interference claim.

4 Westmark's section 1983 claim and pendent state tort intentional interference claim
5 were based on the same operative set of facts: Burien's attempts to delay and ultimately
6 thwart Westmark's development project. Burien used its regulatory power to delay and
7 attempt to thwart the project – *not to further legitimate regulatory interests*, but to appease a
8 state legislator who lived next to the project and did not want the property to be used for an
9 apartment building. *See* Amsbary Decl., Ex. F, pp. 1373-82; Ex. G, pp. 2061-63; Ex. H, p.
10 1093 (Dkt. #57) (state court trial testimony of Hempelmann, Sayani, and Richert,
11 respectively).¹ Although the property was zoned for multi-family housing, Burien did not
12 want “apartment people” in its town and therefore tried to kill the project. *Id.*, Ex. F, pp.
13 1406-07. Not wanting “apartment people” and seeking to appease a state legislator are not
14 legitimate regulatory purposes.

15 Not only did Burien act for improper purposes – *i.e.*, purposes that do not advance a
16 legitimate state interest – but Burien also used an illegal means to achieve that purpose.
17 Rather than processing Westmark's application through the normal process, Burien singled
18 out the project and sought to kill it by refusing to act. *See id.*, Ex. I (Interlocal Agreement),
19 Ex. J, ¶ 3.9 (Amendment to Interlocal Agreement). Such government conduct is an abuse of
20 power, unrelated to any legitimate regulatory purpose, that violates Westmark's right to
21 substantive due process.

22
23 ¹ John Hempelmann served as Westmark's attorney during the 1990's. Nizar Sayani is President of Westmark Development Corp. and Chairman of Trizec Investment Corp. Roger Richert served as Westmark's architect for the Emerald Pointe project that is central to this dispute.

1 These **same operative facts** formed the tortious interference claim and were proven at
2 trial. After Westmark's jury trial, Division I of the Court of Appeals affirmed the verdict and
3 summarized as follows

4 Here, Westmark alleged that Burien acted for an **improper purpose**
5 by singling out Emerald Point because of its **opposition to apartment**
6 **dwellers** and its **desire to appease a state representative** who lived
7 near the development site. Similarly, the City of Seattle in *Pleas* acted
8 for an improper purpose by singling out a particular development in
9 order to appease a neighborhood group. Here, Westmark alleged that
10 Burien improperly delayed its revised application. Similarly, in *Pleas*
11 the court found that Seattle's **improper means** was "**arbitrarily**
12 **delaying**" the developer's project. The facts in *Pleas* are sufficiently
13 analogous to the facts in this case. We affirm.

14 *Westmark*, 140 Wn. App. at 563-64 (emphasis added) (citing *Pleas v. City of Seattle*, 112
15 Wn.2d 794 (1989)). The appellate court further ruled:

16 Westmark argues that it presented sufficient evidence that Burien
17 interfered with its business expectancy for an improper purpose and by
18 improper means. Specifically, Westmark argues that substantial
19 evidence supported the inference that Burien singled out Westmark's
20 project because it was an apartment building and because of pressure
21 from a local politician (improper purpose) and improperly delayed
22 review of the project (improper means). We affirm the trial court
23 because, viewing the evidence in a light most favorable to Westmark,
there was substantial evidence from which the jury could conclude
that Burien acted for an improper purpose or by improper means.

Id. at 556 (emphasis added).

 Obviously, the facts supporting the intentional interference with business expectancy
claim are the same operative facts that underlie the substantive due process claim. Moreover,
it is the arbitrariness and illegitimate purpose that supports the similar legal theories of both
the intentional interference claim and the substantive due process claim.

1 **B. There are no Special Circumstances that would Render an Award Unjust**

2 The Supreme Court has explained that although an award of fees under § 1988 is
3 discretionary, the prevailing party “should ordinarily recover an attorney’s fee unless special
4 circumstances would render such an award unjust.” *Hensley*, 461 U.S. at 429; *Newman v.*
5 *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

6 The Ninth Circuit states:

7 We have interpreted this statement [in *Hensley*] to mean that a court’s
8 discretion to deny fees under § 1988 is **very narrow** and that **fee**
 awards should be the rule rather than the exception.

9 *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir. 1989) (quoting *Ackerley*
10 *Communications, Inc. v. City of Salem*. 752 F.2d 1394, 1396 (9th Cir. 1985), *cert. denied*, 472
11 U.S. 1028 (1985)) (emphasis added). Moreover, the Ninth Circuit has been clear that the
12 defendant has the burden of showing special circumstances warrant a
13 denial of fees, and the defendant’s showing must be a strong one.
14 *Id.* at 744 (citations omitted); *see also Saint John’s Organic Farm v. Gem County Mosquito*
15 *Abatement Dist.*, 574 F.3d 1054, 1064 (9th Cir. 2009) (denial of fees on basis of special
16 circumstances is “extremely rare”).

17 In the present case, there are no special circumstances that would warrant denial of
18 fees. For example, the fact that Westmark had the financial ability to pay its attorneys is not a
19 special circumstance warranting denial of fees. In *Herrington*, the Ninth Circuit reaffirmed
20 that “the plaintiff’s financial resources and access to counsel are **not valid reasons** to deny
21 fees under § 1988.” *Herrington*, 883 F.2d at 743 (emphasis added). The Court noted that its
22 position is consistent with other circuits. *Id.*

1 Nor is Westmark's motivation for bringing the lawsuit relevant. Burien might be
2 tempted to argue that Westmark was motivated to recover its financial losses, rather than
3 promote a constitutional right, and that this motivation is a special circumstance warranting
4 denial of fees. But again, the Ninth Circuit has already rejected that argument. *See*
5 *Herrington*, 883 F.2d at 744-45. One of the key congressional purposes of enacting § 1988
6 was to encourage voluntary compliance with the Constitution by local governments. That
7 purpose is furthered regardless of whether Westmark was motivated by its own desire to be
8 compensated. Indeed, the more successful Westmark was in securing compensatory damages,
9 the more encouraged Burien should be to not make the same mistake in the future.

10 The County also contends that a fee award is unjust because the
11 Herringtons were motivated to sue primarily by an expectancy of
12 personal financial gain rather than a desire to promote constitutional
13 rights and because the Herringtons, rather than the public at large, are
14 the main beneficiaries of the success of their lawsuit. We previously
15 held that these factors do not suffice to render a fee award unjust. In
16 *Ackerley*, we reasoned that public interests are advanced by civil rights
17 actions even when the plaintiff is the main beneficiary of the suit and
18 financial gain is the primary motive because a major goal of § 1988,
19 **encouraging voluntary compliance** with the Constitution by
20 government entities, **is furthered regardless of these factors.**

21 *Herrington*, 883 F.2d at 744-45 (internal citations omitted) (emphasis added).

22 The same is true in Westmark's case. Although Westmark was certainly motivated by
23 the desire to recover its losses, Burien should nevertheless be encouraged to avoid future
attempts to wield its regulatory power in a manner that seeks to improperly thwart or delay
projects, or to appease local politicians, or to improperly keep "apartment people" out of the
City. The land use regulatory power must be used to advance *legitimate* government
objectives in order to be constitutional. It is certainly hoped that Burien officials have learned
that lesson and will be stimulated to do a better job complying in the future.

1 Nor can Burien claim that there is no public benefit resulting from this case.
2 Stimulating future voluntary compliance is certainly an important public benefit, *and a*
3 *recognized congressional purpose. Ackerley Communications*, 752 F.2d at 1397. But even
4 beyond this, there are other transcending social and economic benefits. As stated by the Ninth
5 Circuit:

6 The fact that the party who initiated the action is the primary
7 beneficiary of its own success is not, however, a valid reason for
8 denying fees under section 1988. As we stated in *Seattle School*
9 *District [No. 1 v. State of Washington]*, 633 F.2d 1338 (9th Cir. 1988)],
10 “The congressional purpose in providing attorney’s fees was ... *to*
11 *stimulate voluntary compliance with the law.*” Thus there are public
interest considerations that transcend the conferring of a financial
benefit on a prevailing party. As the district court itself noted, “The
benefit conferred by the decision in this case is not a trivial one, and is
theoretically of benefit to all the inhabitants of Multnomah County and
the City of Salem.”

12 *Id.* (italics by the court; internal citations omitted).

13 Likewise, in addition to future voluntary compliance, the public benefit of Westmark’s
14 case is not a trivial one. The power to regulate land use is one of the most important and far-
15 reaching powers of a local government. It touches the lives of all residents. It affects where,
16 and how, people live. As the Ninth Circuit has often recognized, land use regulation is a
17 “sensitive area of social policy.” *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401,
18 409 (9th Cir. 1996) (quoting *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir.
19 1984) *cert. denied*, 469 U.S. 1211 (1985)). In the present case, this lawsuit clears the way for
20 the Emerald Pointe apartment project to be built and for new apartment renters to be able to
21 live in Burien who might not otherwise be able to find a suitable apartment in that City.

22 Burien might argue that it is inequitable for Burien to pay attorney’s fees when it has
23 already paid an exceptionally high trial court judgment of approximately \$10.7 million in

1 delay damages. The substantial amount of the judgment, however, is not a special
2 circumstance, nor does it cut against Westmark's equitable standing. Rather, it supports an
3 award of attorney's fees.

4 [T]he basic purpose of a § 1983 damages award should be to
5 compensate persons for injuries caused by the deprivation of
constitutional rights.

6 *Farrar*, 506 U.S. at 112 (quoting *Carey v. Phipps*, 435 U.S. 247, 254 (1978)). Obviously, this
7 congressional purpose of securing compensatory damages has been achieved. Unlike other
8 cases where only nominal or *de minimis* damages are achieved, the substantial degree of
9 success by Westmark supports a reasonable fee award.

10 Indeed, "the most critical factor" in determining the reasonableness of
11 a fee award "is the degree of success obtained."

12 *Id.* at 114 (quoting *Hensley*, 461 U.S. at 436). In contrast to Westmark's case, attorney's fees
13 in *Farrar* were denied where the plaintiff sued for \$17 million and after many years of
14 litigation received only \$1. The mere technical victory with *de minimis* damages did not
15 warrant a fee award.

16 Westmark's success is far more than a technical victory, and this success is recognized
17 by the Supreme Court as a critical factor to determine the reasonableness of a fee award. This
18 is also consistent with the congressional purpose of stimulating voluntary compliance.
19 Indeed, it would be foolish for Burien to ignore such a large damages award and to fail in the
20 future to better exercise its regulatory power in furtherance of legitimate regulatory
21 objectives.

22 Finally, it should be noted that this was a high risk case for Westmark. The litigation
23 was filed in 1996 and was not concluded in the state courts until 2008, *twelve years later*.

1 Along the way, Westmark had to prepare for trial three separate times (1998, 2004, and 2006),
2 and had to win two appeals before the state appellate courts. Throughout the litigation there
3 were numerous motions, substantial discovery, and complex facts to be presented through
4 witnesses and documentary evidence. The trial itself lasted approximately six weeks with
5 numerous witnesses and exhibits. To be sure, this lawsuit was no slam dunk, and no sure bet.

6 At bottom, this case is far from being a case where at the outset of litigation, the
7 plaintiff had a high likelihood of success. Indeed, the likelihood of *any success* was always in
8 jeopardy until the day the jury verdict came in, and even until the conclusion of all appeals.
9 Accordingly, there is no equitable basis to claim a special circumstance justifying denial of
10 Westmark's attorney's fees based on Westmark's high likelihood of success. Indeed, after
11 years of litigation, it would be quite remarkable for Burien to even attempt to argue that
12 Westmark actually had such a high likelihood of success that it shouldn't even be entitled to
13 attorney's fees.

14 As the prevailing party, and under *Maier v. Gagne*, Westmark is entitled to its
15 reasonable attorney's fees.

16 Attorney's fees under Section 1988 are thus not only an added burden
17 to encourage voluntary compliance, but **an entitlement** to a prevailing
18 party which encourages and facilitates access to the courts. Section
1988 was enacted for the very purpose of influencing governmental
entities to make thoughtful efforts to avoid civil rights violations.

19 *Ackerley Communications*, 752 F.2d at 1398 (emphasis added).

20 **C. Segregation and Determination of Reasonable Attorneys Fees**

21 The Declaration of John M. Groen In Support of Westmark's Calculation of
22 Attorney's Fees is filed with this motion. That declaration sets forth the protocol followed to
23 segregate recoverable time from unrecoverable time.

1 The 17 years of litigation are broken down into four phases. The first phase represents
2 the time during the original filing of the lawsuit until the apparent settlement right before trial
3 in 1998. Phase Two represents the time attempting to enforce the settlement. Phase Three is
4 the time when the original claim was re-instated and the case was brought to trial in 2005 on
5 the intentional interference claim. This phase concludes when the Washington Supreme
6 Court denied further review. Phase Four is the litigation in this Court seeking to collect
7 attorneys fees.

8 Within these four phases, John Groen's declaration then breaks out smaller time
9 periods and provides a corresponding exhibit with a spreadsheet and the relevant billing
10 records for that time period. The billing records show the handwritten notations of whether
11 each time entry is claimed or not. The spreadsheet shows the entries claimed for
12 reimbursement, each timekeeper, and the corresponding billing rate. The spreadsheet also
13 provides the total fees claimed for that time period.

14 As mentioned, the general protocol was to only seek reimbursement for the time
15 related to the substantive due process claim and the intentional interference claim. Likewise,
16 time expended on matters related to King County as a defendant are excluded and not
17 claimed. To avoid duplication or excessive billing, all paralegal time was excluded. Time
18 related to client communications, administrative matters, and similar entries are generally
19 excluded. The Declaration of John M. Groen provides additional detail on the protocol and
20 the rigorousness that was employed to exclude non-recoverable time.

21 **D. Interest Adjustment to Compensate for Lengthy Delay in Recovering Fees**

22 Clear Supreme Court precedent establishes that a court may make an adjustment to an
23 award of attorney's fees under 42 U.S.C. § 1988 in order to properly compensate the

1 prevailing party for the delay in payment of said fees. *See Perdue v. Kenny A. ex rel. Winn*,
2 559 U.S. 542 (2010); *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 282 (1989). In *Jenkins*, the
3 Supreme Court squarely held that an enhancement of the § 1988(b) fee award for a delay of
4 payment via an upward lodestar adjustment is appropriate in determining a reasonable
5 attorney’s fees. *See Jenkins*, 491 U.S. at 274.

6 In order to properly adjust a fee award for lengthy delays, some courts have used
7 current market-value rates—that is, these courts have applied a present rate to all of the time
8 expended over the life of the case. *See e.g. Gates v. Deukmeian*, 987 F.2d 1392, 1407 (9th
9 Cir. 1992). However, while it could be argued that this method is the simplest and most
10 convenient for the court to handle, such an argument does not make it “more economically
11 rational.” *Chalmers v. City of Los Angeles*, 676 F. Supp. 1515, 1527 (C.D. Cal. 1987).
12 Indeed, many decisions have opted instead to use the second alternative, that is utilizing
13 “market interest rates, usually the prime rate, to historic billing rates, **as a more accurate**
14 **measure** than current rates of the lost time-value of money, both from inflation and from the
15 loss of use of the money, due to a delayed payment of the statutory fee.” Schwartz & Kirklin,
16 Sec. 1983 Litig. Stat. Attorney Fees § 7.05—Upward Adjustment for Delay in Fee Payment.²
17 (emphasis added).

18 For example, in *Chalmers*, the court utilized an “adjusted historic billing rate”
19 approach, utilizing the historic market rate of interest, as compensation for both inflation and
20 the loss of use of the money over the period of the delay in payment of a statutory fee. 676
21 F.Supp. at 1515. When selecting the appropriate rate multiplier, the court adjusted by
22 increasing the fee for each year, based on the use of historic U.S. Treasury bill rates. *Id.*

23 ² Schwartz & Kirklin cite numerous sources to support this statement which are too voluminous to incorporate here.

1 Ultimately, “the adjusted historic billing rate approach **is the more economically**
2 **rational method**” when upwardly adjusting a lodestar attorney’s fee award. *Chalmers*, 676
3 F. Supp. at 1527 (emphasis added); *see also* Schwartz & Kirklin, Sec. 1983 Litig. Stat.
4 Attorney Fees § 7.05.

5 In the present case, the Court is asked to make an upward adjustment based on the
6 United States Treasury Bill rates as set forth in the Declaration of W. Forrest Fischer.

7 While many cases involve upward adjustments for only several years of delay, the
8 delay in the present case is exceptionally long. Accordingly, the upward adjustment is fully
9 warranted. Westmark does not seek an upward adjustment for the time in Phase Four of the
10 litigation after 2008. Westmark also does not seek interest for 2013, but stops calculation of
11 interest at the end of 2012.

12 **E. Summary of Fee Calculation**

13 Taking the data from the spreadsheets and Declaration of W. Forrest Fischer, it is
14 determined that a total of 8,662 hours were expended in this litigation. Of those hours,
15 Westmark is claiming reimbursement for 6,621 total hours. In applying the reasonable hourly
16 rates for all the different timekeepers, these total hours compute to a total award of
17 \$1,410,610.00. Using the T-Bill rates, an upward adjustment of \$606,055.43 is requested to
18 bring the total award of attorneys fees to \$2,016,665.43. A proposed order is attached hereto
19 as Appendix B.

20 Westmark reserves the opportunity to make final adjustments for time expended on
21 this fee motion in August, September, and through final briefing and argument on this motion.
22
23

1 For all the foregoing reasons, it is respectfully requested that the Court award
2 Westmark a reasonable attorneys' fee award of \$2,016,665.43.

3 Executed by me this 2nd day of October, 2013 at Bellevue, Washington.

4
5 s/ John M. Groen
John M. Groen, WSBA #20864

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Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 2, 2013, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to the
4 following:

4 Kenneth W. Harper
kharp@mjbe.com

5 Kirk A. Ehlis
kehlis@mjbe.com

7
8 Dated: October 2, 2013

9 s/ John M. Groen

10 John M. Groen, WSBA #20864

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